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UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

NO. 15-3334

HARRY J. JOHNSON, APPELLANT,

V.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS, APPELLEE.

Before PIETSCH, *Judge*.

MEMORANDUM DECISION

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

PIETSCH, *Judge*: Harry J. Johnson appeals through counsel a July 8, 2015, decision of the Board of Veterans' Appeals (Board) that denied entitlement to service connection for a psychiatric disorder, to include post-traumatic stress disorder (PTSD). He contends that the Board inadequately explained its determination that VA was not required to provide a medical opinion as to service connection pursuant to its duty to assist. This appeal is timely and the Court has jurisdiction pursuant to 38 U.S.C. §§ 7252(a) and 7266(a). Single-judge disposition is appropriate. *Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the reasons that follow, the Court will affirm, in part, and vacate, in part, the Board's decision and remand the vacated matter for further proceedings consistent with this decision.

I. BACKGROUND

The following summary of the claim history most relevant to the issues on appeal is reflected in the record of proceedings before the Court (record of proceedings).

The appellant served on active duty in the U.S. Army from April 1965 to June 1966. Record (R.) at 4, 632. His service medical records do not reflect treatment for a mental disorder. R. at 10. In April 1966, he was recommended for a discharge from the military based on performance issues.

R. at 611-29, 637-39. It was noted that he "was always getting drunk at night and coming back to the area making all kinds of noise." R. at 626. His superior officer stated that he had "a defective attitude and the inability to expend effort constructively." R. at 628, *see also* R. at 617-18. An April 1966 psychiatric evaluation conducted two months prior to the appellant's separation from the military resulted in a finding of "no psychiatric disorder." R. at 10, 611.

Post-service medical records reflect the appellant's participation in a substance abuse treatment program in 1992 related to cocaine use. R. at 117-163. He reported use of cocaine since 1973, becoming more frequent and problematic in 1985. R. at 139, 158. He also indicated prior treatment in 1972 for alcohol abuse, prompted by a diagnosis of hepatitis, and only occasional use of alcohol thereafter. R. 158.

A diagnostic summary in March 1992 indicated that there was no history of significant psychiatric dysfunction and that "cognitive and psychological functioning is within normal limits." R. at 158. The examiner noted that the appellant might be experiencing a mild depression, "most likely in reaction to his substance abuse and other psychosocial stressors." *Id*. She indicated that the appellant had experienced a significant change in his life several years prior when he lost a well-paying job and was not able to find comparable employment. *Id*. She further indicated that resulting financial problems, relocation, and loss of self-esteem and self-worth appeared to be directly related to his increased use of cocaine, which "appears to be his primary method of escaping from his difficulties." R. at 158-59.

The appellant again sought treatment for substance abuse in March 1994. R. at 197-209. He reported that his alcohol use began at age 19, with daily use until he was 28. R. at 206. He indicated that he had abstained from cocaine use for two years, but had used cocaine again in February 1994, and was drinking several times a month, following his loss of employment in November 1993. R. at 197, 202-03, 207. The examiner indicated a diagnosis of cocaine dependence, alcohol dependence, and cannabis abuse in partial remission. R. at 206. The appellant denied a history of significant depression or anxiety, but reported "some recent depressed mood related to unemployment and other stressors." R. at 202. The examiner found that he did not meet the criteria for a depressive disorder, but recommended continued monitoring. R. at 203, 207. Notes of a social assessment indicated that the appellant "discussed some of his anger at the military and its [treatment] of him." R. at 201.

The appellant again sought treatment for substance abuse in November 2005, after an increase in cocaine use. R. at 338-53, *see* R. at 347. A psychiatry evaluation contains a diagnostic impression of cocaine dependence and alcohol abuse. R. at 348. In addition, a separate record lists a diagnosis of depression NOS (not otherwise specified), without explanation. R. at 338.

The appellant sought further treatment in 2008 for cocaine use. R. at 2559-78. He reported during a May 2008 psychiatric evaluation that he "drank alcohol from 1962 to 1973." R. at 2562. He stated that he believed that he was using cocaine because he was depressed and indicated that he had been prescribed medication for depression in the past. R. at 2562. He noted that his recent stressors included attempting to get full disability for his hearing loss, a coming court date for allegations that he had been writing fraudulent checks, and a recent disagreement with a friend who owed him money. *Id*. The examiner noted that the appellant's depression symptoms "appear to be more of a dysphoria associated with cocaine use." *Id*.

In July 2008, the appellant presented to an emergency room with symptoms of depression that he indicated had been present for over one year, including depressed mood, hopelessness, worthlessness, guilt, and shame. R. at 2544-46. He cited stressors as "frequent disappointments in his life and an inability to achieve goals." R. at 2545. He indicated that he felt that he was a burden on his family and had become more depressed after he was the victim of an armed robbery. *Id*.

In September 2008, the appellant reported to his physician that he was separated from the service because of his behavior, which he described as "mental." R. at 2433. The appellant stated that he "thought these junior officers from West Point abused their power," but that he "loved the military." *Id*.

In October 2010, the appellant submitted a claim for service connection for PTSD. R. at 480-81. He included a supporting statement indicating that he turned to alcohol in service, when he was stationed in Germany with an infantry division. R. at 478. He explained that he was attempting to relieve mental pain and fear associated with the prospect that the might be sent to fight in Vietnam. *Id*. He also asserted that he was "a target of harassment in service which resulted in being a target for a bad discharge." *Id.* He stated that the "process hurt me dearly" and that "all of this contribute[d] to drug abuse." *Id*. Finally, he indicated that his treatment program had "allowed me to realize that the hurt is still there." *Id*.

The VA regional office (RO) denied service connection for PTSD in November 2012, R. at 68-74, and the appellant filed a Notice of Disagreement, R. at 67.

In January 2013, the appellant was seen by a VA psychiatrist for "flashbacks." R. at 1651-60. The appellant reported that he had been sober from cocaine and alcohol since 2009, but complained of episodes during which he felt "down" and of having vivid and disturbing dreams and flashbacks "related to being in the military and how difficult it was." R. at 1561, 1563. He indicated that he was not exposed to combat situations, but did witness an instructor take a bullet when he inadvertently walked onto the rifle range during practice. *Id*. However, his vivid dreams at night were not about this incident. *Id*. He reported avoiding people, places, and things associated with substance abuse. *Id*.

The examiner diagnosed depression NOS, cocaine dependence in remission, and "r/o [(rule out)] PTSD." R. at 1652, 1655.

A March 2013 mental health note by a VA psychologist again included a diagnosis of depression NOS. R. at 1610-13. The examination report notes the appellant's statement that he "dealt with racism in the Army, wrote a letter about it to the Pentagon, and described being regularly accosted by superior officers for writing this letter." R. at 1611. He also noted the appellant's report of having substance abuse problems while in the military and that he was still bitter from his being discharged and blocked from reenlisting. *Id*. The examiner concluded that the appellant did not report any event during service that would meet the stressor criterion for a diagnosis of PTSD. *Id*.

In January 2014, the RO issued a Statement of the Case continuing the denial of service connection for PTSD, R. at 29-48, and the appellant perfected his appeal to the Board, R. at 25.

In July 2015, the Board issued the decision currently before the Court. R. at 3-13. The Board noted the diagnosis of depression and restated the claim more broadly as involving service connection for a psychiatric disorder, to include PTSD. R. at 3-4. With respect to PTSD, the Board denied service connection due to the lack of a medical diagnosis. R. at 9-10. With respect to depression, the Board denied service connection due to insufficient evidence that the disability was related to service. R. at 10-13. The Board made its determinations without the benefit of a VA medical examination and opinion as to service connection, but found that the evidence was insufficient to trigger the obligation to obtain such an opinion pursuant to VA's duty to assist.

II. ANALYSIS

Before the Court, the appellant challenges the Board's denial of service connection for an acquired psychiatric disorder, but makes no argument challenging the Board's finding that service connection was not warranted for PTSD. The Board's determination in this regard therefore will be affirmed. *See Johnson v. Shinseki*, 26 Vet.App. 237, 239 (2013) (affirming the Board's determination as to issues appealed but not argued); *Coker v. Nicholson*, 19 Vet.App. 439, 442 (2006) (stating that an appellant "must plead with some particularity the allegation of error"), *rev'd on other grounds sub nom. Coker v. Peake* 310 Fed. Appx. 371 (Fed. Cir. 2008) (per curiam order); *Hilkert v. West*, 12 Vet.App. 145, 151 (1999) (en banc) (stating that the appellant bears the burden of persuasion on appeal to show Board error), *aff'd per curiam*, 232 F.3d 908 (Fed. Cir. 2000)(table).

With respect to the Board's determination that service connection was not warranted for depression, the appellant contends that the Board's failed to adequately explain its determination that VA's duty to assist did not require a remand to afford the appellant a VA medical opinion as to whether his depression is related to service (medical nexus opinion). Although the Secretary argues to the contrary, the Court agrees with the appellant.

Establishing service connection generally requires medical or, in certain circumstances, lay evidence of (1) a current disability; (2) an in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the claimed in-service disease or injury and the present disability. *See Davidson v. Shinseki*, 581 F.3d 1313 (Fed. Cir. 2009); *Hickson v. West*, 12 Vet.App. 247, 253 (1999); *Caluza v. Brown*, 7 Vet.App. 498, 506 (1995), *aff'd per curiam*, 78 F.3d 604 (Fed. Cir. 1996) (table).

The Board must provide a statement of the reasons or bases for its determination, adequate to enable an appellant to understand the precise basis for its decision, as well as to facilitate review in this Court. 38 U.S.C. § 7104(d)(1); *Allday v. Brown*, 7 Vet.App. 517, 527 (1995); *Gilbert v. Derwinski,* 1 Vet.App. 49, 56-57 (1990). To comply with this requirement, the Board must analyze the credibility and probative value of the evidence, account for the evidence it finds persuasive or unpersuasive, and provide the reasons for its rejection of any material evidence favorable to the claimant. *Caluza*, 7 Vet.App. at 506.

Pursuant to 38 U.S.C. § 5103A, the Secretary has a duty to assist claimants in developing and obtaining relevant evidence needed to substantiate their claims. For disability compensation claims, the Secretary's duty to assist includes "providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1); *Green v. Derwinski*, 1 Vet.App. 121, 124 (1991). A medical examination or opinion is considered necessary

> when there is (1) competent evidence of a current disability or persistent or recurrent symptoms of a disability, and (2) evidence establishing that an event, injury, or disease occurred in service or establishing certain diseases manifesting during an applicable presumptive period for which the claimant qualifies, and (3) an indication that the disability or persistent or recurrent symptoms of a disability may be associated with the veteran's service or with another service-connected disability, but (4) insufficient competent medical evidence on file for the Secretary to make a decision on the claim.

McLendon v. Nicholson, 20 Vet.App. 79, 81 (2006); *see* 38 U.S.C. § 5103A(d); 38 C.F.R. § 3.159(c)(4)(i) (2016).

The third element, requiring an indication that the disability, or persistent or recurrent symptoms of a disability, may be associated with the claimant's service, establishes "a low threshold." *McLendon*, 20 Vet.App. at 83. This determination must be based on "the evidence of record before the Secretary, taking into consideration all information and lay or medical evidence (including statements of the claimant)." 38 U.S.C. § 5103A(d)(2).

> The types of evidence that 'indicate' that a current disability 'may be associated' with military service include, but are not limited to, medical evidence that suggests a nexus but is too equivocal or lacking in specificity to support a decision on the merits, or credible evidence of continuity of symptomatology such as pain or other symptoms capable of lay observation.

McLendon, 20 Vet.App. at 83. Such evidence need not be either medical or competent, but an appellant's conclusory, generalized statements, standing by themselves, do not necessarily cross the low evidentiary nexus threshold. *Colantonio v. Shinseki*, 606 F.3d 1378, 1382 (2010); *Waters v. Shinseki*, 601 F.3d 1274, 1277-78 (Fed. Cir. 2010).

The Board noted that the appellant had been diagnosed with depression, but found that the third *McLendon* element was not satisfied, explaining that (1) the evidence "does attribute the

Veteran's depressive symptoms to non-service factors such as unemployment and financial difficulties" and (2) "while the [appellant] has suggested that his service experiences caused him to abuse cocaine, which in turn contributed to his depressive symptoms, there is no support in the medical evidence for such a finding." R. at 7. The Board thus determined that there was no "indication" that the appellant's depression "may be associated with service." *Id*.

As to the first basis, that the record evidence attributed depressive symptoms to non-service factors such as unemployment and financial difficulties, the Board, as argued by the appellant, did not specify the evidence upon which it relied. In addition, the Board did not indicate whether it was relying on competent medical evidence in this regard or whether the operative evidence related to the appellant's depression as first diagnosed in 2005, as opposed to earlier indications of a depressed mood. In short, the Board's conclusory statement does not adequately inform the Court or the appellant of its analysis of the evidence.

Although the Board's merits discussion references potentially relevant evidence, R. at 10-11, the Court cannot conclude that the Board's discussion in that context provides an adequate substitute. For example, the Board referenced in its merits discussion 1992 treatment records which it characterized as "indicat[ing] that the [appellant's] then-current psychosocial stresses of unemployment, financial strain, and relocation appear to be contributing to his cocaine use and that his substance abuse appeared to be his primary method of escaping from his difficulties." R. at 10; *see* R. at 158-59. To the extent that the Board implicitly relied on this or similar evidence in assessing VA's compliance with its duty to assist, it is unclear how the Board construed the examiner's identification of stressors potentially related to substance abuse as a medical finding as to the etiology of depression symptoms or the diagnosed depression disability.

As a further example, the Board referenced in its merits discussion a March 1994 psychiatric assessment reflecting that the appellant "indicated experiencing recent feelings of depression related to unemployability and financial stressors," but was not diagnosed with a depressive order at that time. R. at 10; *see* R. at 202-08. However, it is not clear from the assessment that the examiner was making her own assessment about the etiology of the appellant's depressed mood as opposed to simply reporting the impressions of the appellant as to his "depressed mood," *see* R. at 202-03, 206, and the Board found that the appellant was not competent to opine on the etiology of his depression,

R. at 12. Moreover, it is not clear how the appellant's depressed mood in 1994 relates to his depression that was diagnosed many years later in 2005. *See* R. at 11, 338. Without any explanation from the Board as to how this evidence specifically relates to the third *McClendon* element, the Court cannot find that the Board's description of the evidence in the merits section of its decision provides adequate reasons and bases in regard to its determination as to VA's duty to provide a medical nexus opinion.

The Court also finds that the Board did not adequately explain its reliance on the finding that there was "no support in the medical evidence" for the appellant's assertion that his service experiences caused him to abuse cocaine, which in turn, contributed to his depressive symptoms. The Board did not acknowledge that the third *McLendon* element can be satisfied without medical evidence and neglected to discuss favorable relevant evidence. *See Colantonio*, 606 F.3d at 1382 ("medically competent evidence is not required in every case to 'indicate' that the claimant's disability 'may be associated' with the claimant's service"); *Thompson v. Gober*, 14 Vet.App. 187, 188 (2000) (the Board must provide an adequate statement of reasons or bases "for its rejection of any material evidence favorable to the claimant"). For example, the Board neglected to discuss in this context evidence potentially indicating that the appellant turned to substance abuse in service to deal with a fear that he would be sent to Vietnam, evidence of his behavioral problems in service, the appellant's statements that he was subjected to racism in service and unjust harassment by his superiors, which contributed to his substance abuse, and evidence that later depressive symptoms were related to his use of cocaine. *See, e.g.*, R. at 478 (appellant's October 2010 statement discussing the causes of his substance abuse in service); 1611 (March 2013 mental health note reflecting the appellant's statements that he was the subject of racism in the Army, that he was mistreated by superior officers after writing a complaint letter to the Pentagon, and that he had problems with substance abuse during service); 611-29, 637-39 (service records reflecting excessive drinking, disciplinary problems, a defective attitude, problems following orders, and problems maintaining hygiene); 2562 (May 2008 psychiatric evaluation notes indicating that the appellant's depression symptoms "appear to be more of a dysphoria associated with cocaine use"). The Board also did not discuss evidence potentially indicating that the inception of the appellant's cocaine use coincided with his discontinuation of alcohol abuse following his treatment from December 1972 to March

1973. *See* R. at 139 (medical notes reflecting history of cocaine use since 1973); 158 (medical notes reflecting only occasional alcohol use since the 1972 treatment for alcohol abuse); 2433 (medical notes reflecting hospitalization for alcohol-related problems from December 1972 to March 1973, followed by abstention from alcohol); 2562 (medical record noting use of alcohol from 1962 to 1973 and cocaine use "since the 70's").

Although the Board discussed some of the above-referenced evidence in the merits portion of its decision, it did not do so in connection with an assessment of whether the record evidence met the "low threshold" of indicating that the appellant's depression may be associated with service such that a VA medical nexus opinion was required. *See McLendon*, 20 Vet.App. at 83. The Board's failure to adequately explain why the evidence of record was not sufficient to entitle the appellant to a VA medical examination and opinion renders its statement of reasons or bases inadequate to permit meaningful review by this Court. *See Allday,* 7 Vet.App. at 527. Remand therefore is warranted to enable the Board to sufficiently explain why such an opinion is not necessary or take other appropriate action consistent with this decision. *See*, *e.g.*, *Duenas v. Principi*, 18 Vet.App. 512, 519 (2004) (remanding for the Board to provide an adequate statement of reasons and bases for its decision that a VA medical examination was not required).

The Court will not at this time address the remaining arguments and issues raised by the appellant that have not been considered by the Board. *See Quirin v. Shinseki*, 22 Vet.App. 390, 395 (2009) (holding that the Court will not ordinarily consider additional allegations of error that have been rendered moot by the Court's opinion or that would require the Court to issue an advisory opinion); *Best v. Principi*, 15 Vet.App. 18, 20 (2001) (noting that the factual and legal context may change following a remand to the Board and explaining that "[a] narrow decision preserves for the appellant an opportunity to argue those claimed errors before the Board at the readjudication, and, of course, before this Court in an appeal, should the Board rule against him.").

On remand, the appellant may present, and the Board must consider, any additional evidence and argument in support of the matter remanded. *See Kay v. Principi,* 16 Vet.App. 529, 534 (2002); *Kutscherousky v. West*, 12 Vet.App. 369, 372-73 (1999) (per curiam order). The Court has held that "[a] remand is meant to entail a critical examination of the justification for the decision." *Fletcher*

v. Derwinski, 1 Vet.App. 394, 397 (1991). This matter is to be provided expeditious treatment on remand. *See* 38 U.S.C. § 7112.

III. CONCLUSION

Upon consideration of the foregoing analysis, the record of proceedings, and the filings of the parties, that part of the July 8, 2015, Board decision that denied service connection for PTSD is AFFIRMED. That part of the Board decision that denied service connection for depression is VACATED and that matter is REMANDED for further proceedings consistent with this decision.

DATED: November 30, 2016

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